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Section 29 of the Workmen's Compensation Act of Illinois

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SECTION 29 OF THE WORKMEN'S COMPENSATION ACT OF ILLINOIS

What is meant by the phrases "Such other person having also elected to be bound by this act, or being bound thereby under Section Three (3) of this act" and "Such other person having elected not to be bound by this act" as used in the first and second paragraphs of Section 29?

GEORGE W. ANGERSTEIN

BOTH the Appellate and Supreme Courts of Illinois have aptly described Section 29 of the Workmen's Compensation Act of Illinois as a "hydra-headed" section.[1] Likewise, both courts have frequently spoken of the difficulties which arise under the section. It is not the purpose of this article to attempt a review of the many troublesome questions which have arisen under Section 29 or to conjecture as to how various questions which as yet have not been passed upon may be decided when they reach the courts. In fact, the limits of this article do not permit of such a review, as it would require a fair-sized volume to review the many legal questions under Section 29 which have been passed upon by the courts together with those which as yet are undecided.

It is the purpose of this article to comment solely upon one phrase of the section, and this phrase is, "bound by this Act," as construed by the Appellate Court of Illinois, First District. This expression of only four words has been

1 Havana National Bank, for use of Hartford Accident & Indemnity Co. v. Tazewell Club, 298 Ill. App. 393, 19 N.E. (2d) 228 (1939); Joseph Schlitz Brewing Co. v. Chicago Rys. Co., 307 Ill. 322, 138 N.E. 658 (1923).

involved in two cases[2] and the construction given the expression by the Appellate Court, First District, in each of the cases has provided the basis for the court's decision on the principal issue presented in the case.

Before discussing the construction given by the Appellate Court[3] to the phrase "bound by the Act" there is quoted herewith for ready reference, the first two paragraphs of Section 29 of the Workmen's Compensation Act in its present form.

Injury caused under circumstances creating a legal liability in some person other than the employer — Liability.] Where an injury or death for which compensation is payable by the employer under this Act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this Act, or being bound thereby under section three (3) of this Act, then the right of the employee or personal representative to recover against such other person shall be *transferred* to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee.

Where the injury or death for which compensation is payable under this Act was not proximately caused by the negligence of the employer or his employees and was caused under circumstances creating a legal liability for damages on the part of some person other than the employer to pay damages, such other person having elected not to be bound by this Act, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, *however*, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative. (Italics ours.)

Only the first two paragraphs of Section 29 are quoted, for the reason that the expression "bound by this Act" does

[2] Botthof v. Fenske, 280 Ill. App. 362 (1935); Hoff v. Lindstrom & Yellow Cab Co., 284 Ill. App. 651 (1936).

[3] The Supreme Court of Illinois as yet has not had occasion to pass upon the meaning of the expression "bound by this act" for the reason that no case has been presented to it in which the issues involved were similar to those presented in the Appellate Court cases.

not occur in any of the other paragraphs and the scope and general purpose of the entire section are fully disclosed by the provisions of the first two paragraphs.

In *Botthof* v. *Fenske*,[4] the plaintiff brought an action against Fenske, a fellow employee, for personal injuries occasioned by the defendant's backing an automobile against a ladder upon which the plaintiff was working. Both plaintiff and defendant, coemployees, were working for the same employer. The employer was operating under the Workmen's Compensation Act of Illinois. It was contended by the defendant that since he and the plaintiff were coemployees working for the same employer who was bound by the provisions of the Act, and that since both plaintiff and defendant and their common employer were under the Act, the plaintiff's sole remedy was under the compensation act against his employer. The court in its opinion stated:

> Does the Workmen's Compensation Act of this State abolish an employee's common law right of action against anyone for negligently injuring him in the course of his employment if the person so injuring him is not within the contemplation of the statute bound by the act? *What is the legal significance of the language "bound by the act?" If it merely means that defendant was "under the act," in the sense that he had agreed to accept its provisions for the payment of compensation to him by his employer and for such other relief or remedy as the act might afford him, then plaintiff's common law action against him must fail. But similar provisions in varying language to the same effect in the compensation acts of nearly all the jurisdictions where this question has been adjudicated have been construed to mean "subject to its terms," in the sense that one was liable to pay compensation to the injured employee. . . . Certainly the negligent employee is not liable for compensation; therefore he is a stranger to the act, as far as his liability to his fellow employee is concerned, being a person other than the employee entitled to receive compensation or the employer liable to pay it.* The right of the injured employee to sue the third person depends upon whether the latter is subject to the act. Since the co-employee whose misfeasance produced the injury is not subject to the act, he must be regarded as a "third party," and therefore amenable to an action at common law.[5] (Italics ours.)

The court cites numerous authorities from other jurisdictions but inasmuch as the statutory provisions under which the cited cases were decided are in every instance different from those of the Illinois Workmen's Compensation

[4] 280 Ill. App. 362 (1935). [5] Ibid., p. 375.

Act, such cited cases should not be considered entirely persuasive. For illustration, the court in its decision cites the case of *Lees* v. *Dunkerly Brothers*,[6] and quotes a paragraph from the opinion of Lord Chancellor Loreburn in that case.

The *Lees* v. *Dunkerly Brothers* case involved an action by a fellow servant against a coemployee for injuries sustained in the course of his employment. The defendant took the same position as taken by the defendant in the *Botthof* v. *Fenske* case.

The Appellate Court in its opinion, stated:

In passing upon this identical question in Lees V. Dunkerly Bros., supra, Lord Chancellor Loreburn said:

"I can hardly imagine a more dangerous or mischievous principle than that which it is sought to set up here. . . . But it is a very difficult proposition to say that a man is not to be responsible for his own negligence. That would mean a free hand to everybody to neglect his duty towards his fellow servant, and escape with impunity from all liability for damages for the consequences of his own carelessness or neglect of duty. Everyone must have an interest in maintaining the law in a sense hostile to such a proposition, and I should think that, of all classes in the community, workmen who work together in many dangerous employments, have the greatest interest of all in preventing the doctrine which has been put forward very carefully and reasonably from being accepted."

The provision of Section 6 of the English Act, under which *Lees* v. *Dunkerly Brothers*, was decided, was as follows:

Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof . . . if the workman has recovered compensation under this Act the person by whom the compensation was paid . . . shall be . . . indemnified by the person so liable to pay damages as aforesaid. . . .

It at once will be noted that there are important differences between Section 6 of the English Act and Section 29 of the Illinois Act.

Following the *Botthof* v. *Fenske* case was the case of *Hoff* v. *Lindstrom & Yellow Cab Company*,[7] reported only as an abstract decision. In the latter case, Hoff brought a suit against Lindstrom and the Yellow Cab Company. Hoff

[6] [1911] A. C. 5, 80 L. J. K. B. 135, 103 Law Times 467, 55 Sol. Jo. 44, 4 B. W. C. C. 115.

[7] 284 Ill. App. 651 (1936).

was a chauffeur employed by the Krem-Ko Company, which was operating under the Illinois Workmen's Compensation Act. Lindstrom was employed by the Yellow Cab Company, which also was operating under the Illinois Act. There was a judgment against both defendants in the lower court. On appeal the Appellate Court reversed the judgment which had been entered against the Yellow Cab Company, but affirmed the judgment against Lindstrom. In its opinion, the court stated:

> The question as to defendant Lindstrom's liability is entirely different. He was not immune from an action for personal injuries in the instant case. The Workmen's Compensation act is not applicable. *Botthof* v. *Fenske,* 280 Ill. App. 362. In that case it was held by another Division of this court that the Workmen's Compensation act did not abrogate the right of an employee to maintain an action for damages for negligence against a fellow employee of the same employer. Obviously Lindstrom, who was employed by the Yellow Cab Co. at the time in question, was not liable to pay plaintiff compensation under the Workmen's Compensation Act.
>
> The Botthof case goes very thoroughly into the question now before us and we are entirely satisfied with what the court there said.

In considering the opinions of the court in the two cases, *Botthof* v. *Fenske* and *Hoff* v. *Lindstrom,* it is necessary that consideration be given to Section 29 and other sections of the present Illinois Workmen's Compensation Act as originally enacted.

SECTION 29 AS ORIGINALLY ENACTED

From the Illinois Workmen's Compensation Act at the time of its enactment, June 28, 1913, in force July 1, 1913,[8] Section 29 is quoted herewith:

> **Subrogation, independent contractors.]** Where an injury or death for which compensation is payable by the employer under this Act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this Act, then the right of the employee or personal representative to recover against such other person shall be subrogated to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of

[8] The first Workmen's Compensation Act of Illinois was enacted June 10, 1911, in force May 1, 1912, and was repealed by the 1913 Act.

compensation payable under this Act, by reason of the injury or death of such employee.

Where the injury or death for which compensation is payable under this Act was not proximately caused by the negligence of the employer or his employees and was caused under circumstances creating a legal liability for damages on the part of some person other than the employer to pay damages, such other person *having elected not to be bound by this Act,* then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act, but in such case if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative: *Provided,* that if the injured employee or his personal representative shall agree to receive compensation from the employer or to institute proceedings to recover the same or accept from the employer any payment on account of such compensation, such employer shall be subrogated to all the rights of such employee or personal representative and may maintain, or in case an action has already been instituted, may continue an action either in the name of the employee or personal representative or in his own name against such other person for a recovery of damages to which but for this section the said employee or personal representative would be entitled, but such employer shall nevertheless pay over to the injured employee or personal representative all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act and all costs, attorneys' fees and reasonable expenses incurred by such employer in making such collection and enforcing such liability. (Italics ours.)

For a proper understanding of the legislative intent of the above quoted Section 29 from the Act at the time of its enactment, it is essential that other related sections from the 1913 Act also be studied. Certain sections of the 1913 Act have been repealed; other sections have been changed by amendment and the wording of certain portions of still other sections have retained almost their exact identity.

To enumerate the salient facts and to indicate the true situation is admittedly tedious, but in the hope that this article may be at least a small contribution towards the eventual clarification of Section 29, it is deemed worth while to set forth in some detail the pertinent sections of the 1913 Act, their subsequent amendment or repeal, together with

relevant comment, so that the question may be studied more intelligently.

ILLINOIS WORKMEN'S COMPENSATION ACT ORIGINALLY WAS ELECTIVE

As originally enacted, the Illinois Workmen's Compensation Act was elective as to all employers and not compulsory as to any employers. Under Section 1 of the 1913 Act, under the heading — **"Employers within act, acceptance, notice, withdrawal"** — it was provided:

Be it enacted by the People of the State of Illinois, represented in the General Assembly: That any employer in this State may elect to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this Act, and thereby relieve himself from any liability for the recovery of damages, except as herein provided.

Section 2 of the 1913 Act provided, under the heading— **"Non-election, notice, presumption"**—as follows:

Every employer enumerated in section 3, paragraph (b), shall be conclusively presumed to have filed notice of his election as provided in section 1, paragraph (a), and to have elected to provide any pay compensation according to the provisions of this Act, unless and until notice in writing of his election to the contrary is filed with the Industrial Board and unless and until the employer shall either furnish to his employee personally or post at a conspicuous place in the plant, shop, office, room or place where such employee is to be employed, a copy of said notice of election not to provide and pay compensation according to the provisions of this Act; which notice of non-election if filed and posted as herein provided, shall be effective until withdrawn; and such notice of non-election may be withdrawn as provided in this Act.

Section 3 of the 1913 Act under the heading—**"Defenses abolished, occupations within act"**—provided as follows:

(a) In any action to recover damages against an employer, engaged in any of the occupations, enterprises or businesses enumerated in paragraph (b) of this section, who shall elect not to provide and pay compensation to any employee, according to the provisions of the Act, it shall not be a defense, that:

First—The employee assumed the risks of the employment;

Second—The injury or death was caused in whole or part by the negligence of a fellow-servant; or

Third—The injury or death was proximately caused by the contributory negligence of the employee.

(b). The provisions of paragraph (a) of this section shall only apply

to an employer engaged in any of the following occupations, enterprises or businesses, namely:

Thereafter in Section 3 there were listed certain occupations, enterprises or businesses, such as building, construction, excavating, carriage by land and water, mining, etc., and as provided by Section 2, quoted above, the employers engaged in such enumerated occupations, enterprises and businesses were conclusively presumed to have filed notice of their election to provide and pay compensation according to the provisions of the Act. However, it is significant that even those employers engaged in the businesses listed in Section 3, even though presumed to have elected to provide and pay compensation for accidental injuries sustained by their employees according to the provisions of the Act, were nevertheless permitted under Section 2 of the Act to elect to the contrary.

In other words, the 1913 Act was elective as regards all employers in Illinois. The first paragraph of Section 1 provided that "any employer in this state may elect" and this right of election applied to every employer regardless of what his business might be—hazardous or nonhazardous. Under Section 2, it was provided that those employers enumerated in Section 3, paragraph (b) which employments apparently were considered by the legislature to be extra-hazardous although not so designated in the 1913 Act, "shall be conclusively presumed to have filed notice of his election . . . *unless and until notice in writing of his election to the contrary is filed with the Industrial Board,*" so that even the employers engaged in the most hazardous businesses had the right to *elect not to be bound* by the Act.

It is also significant that the legislature provided an inducement to an employer to elect to accept the Act whether or not his business was hazardous. Section 1 provided any employer might elect to accept the Act, "and thereby relieve himself from any liability for the recovery of damages, except as herein provided."

Section 6 of the 1913 Act provided as follows:

Compensation, fatal injuries.] No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee other than the compen-

sation herein provided shall be available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.

Section 11 of the 1913 Act provided as follows:

Employers' liability scope.] The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employees in his employment subject to the provisions of this Act.

In other words, an employer whose business was not enumerated in Section 3, could elect under the provisions of Section 1 to accept the Act and thereby relieve himself from any liability for the recovery of damages, except for payment of compensation as provided by the Act, except as to any of his employees who rejected the Act, and those employers whose businesses were enumerated in Section 3 were conclusively presumed to have accepted the Act unless they filed notice in writing of their election to the contrary with the Industrial Board, and unless they filed a notice not to accept the Act with the Industrial Commission, they, too, were relieved from any liability for the recovery of damages except for compensation as provided by the Act, except as to such of their employees who might reject the Act.

Right of Employees Under 1913 Act to Reject the Act

Under the 1913 Act, as to those employers who elected to provide and pay the compensation provided in the Act, all their employees were deemed to have accepted the Act unless within thirty days after their hiring or after the taking effect of the Act and its acceptance by the employer, such employee "shall file a notice to the contrary with the Industrial Board."

In the light of subsequent developments, and particularly in the light of the courts' construction of the four words "bound by this act" as they appear in Section 29, the provisions of the 1913 Act as regards the right of the employee to reject the Act are very interesting.

Paragraph (c) of Section 1, of the 1913 Act, provided as follows:

(c) In the event any employer elects to provide and pay the com-

pensation provided in this Act, then every employee of such employer, as a part of his contract of hiring or who may be employed at the time of the taking effect of this Act and the acceptance of its provisions by the employer, shall be deemed to have accepted all the provisions of this Act and shall be bound thereby unless within thirty days after such hiring or after the taking effect of this Act, and its acceptance by the employer, he shall file a notice to the contrary with the Industrial Board, whose duty it shall be to immediately notify the employer, and if so notified, the employer shall not be deprived of any common law or statutory defenses existing but for this Act; and until such notice to the contrary is given to the employer, the measure of liability of the employer shall be determined according to the compensation provisions of this Act; *Provided, however,* that any employee may withdraw from the operation of this Act upon filing a written notice of withdrawal at least ten days prior to January 1st of any year with the Industrial Board, whose duty it shall be to immediately notify the employer by registered mail, and, if so notified, the employer shall not be deprived of any common law or statutory defenses existing but for this Act, and until such notice to the contrary is given to the employer, the measure of liability of the employer shall be determined according to the compensation provisions of this Act.

Note that in the above quoted Paragraph (c) of Section 1, of the 1913 Act, that if the employee "filed a notice to the contrary with the Industrial Board" the employer was not "deprived of any common law, or statutory defenses existing but for this Act" and also that if the employee withdrew from the operation of the Act by "filing a written notice of withdrawal" with the Industrial Board, the employer was not "deprived of any common law or statutory defense. . . ." The common law defenses referred to were enumerated in Paragraph (a) of Section 3, previously quoted herein, and were, (1) assumption of risk, (2) negligence of a fellow-servant, and (3) contributory negligence. Clearly these were legislative inducements to both employers and employees to accept the provisions of this Act. If the employer accepted the Act either affirmatively as provided in the first paragraph of Section 1 or by presumption as provided in Section 2, and the employee also accepted the Act, the employer was freed from common law suits for personal injury or death, and his liability was only for compensation as provided by the Act. If the employer, such as whose business was contained in the enumerated list of Section 3, filed his "notice in writing of his election to the contrary" with the

Industrial Board, he was deprived of his common law defenses.

If the employee filed a "notice to the contrary with the Industrial Board" and the employer had elected to provide and pay compensation either affirmatively or by presumption, then in case of a suit for personal injury or death the employer was not deprived of any defense.

Obviously, these various provisions can only be construed as inducements to both employers and employees to accept the provisions of the Act.

WERE THERE LEGISLATIVE INDUCEMENTS IN SECTION 29 OF THE 1913 ACT?

In view of the inducements thus far noted, let us consider Section 29 of the 1913 Act which has been previously quoted. The first paragraph thereof had to do with cases where the employee and the employer were under the Act, and the negligent third person was one who, as described in the words of the Act itself, was "such other person having also elected to be bound by this Act." The second paragraph had to do with cases where the employer and employee were under the Act but the negligent third person, as described in the words of the Act itself, was "such other person having elected not to be bound by this Act."

In the first situation to which the provisions of Section 29 of the 1913 Act was applicable, the employer will be subrogated to the right of the employee or his personal representative to recover against such other person and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount "not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee."

Viewing conditions as they existed up to the time of the enactment of the 1913 Act, does it not seem entirely logical to construe the practical application of such provisions as an inducement to both employers and employees to "elect to be bound" by the provisions of the 1913 Act? Particularly is this self evident when the second situation to which the provisions of the second sentence or paragraph of Section 29

of the 1913 Act is considered. The second situation is where the negligent third person was "such other person having elected not to be bound by this Act." In such situation, legal proceedings could "be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay such compensation under this Act, but in such case if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount recovered by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative."

In the first situation, the employer was subrogated to the right of the employee and the employer might sue the negligent third person and recover damage not exceeding the aggregate amount of compensation for which he was liable under the Act. In the second situation, the employer was entitled to indemnification from the proceeds of the employee's cause of action.

Therefore, as regards the inducements or possible benefits to the employer from his electing "to provide and pay compensation," as indicated by the previously discussed sections (1, 2, 3, 6 and 11) of the 1913 Act, Section 29 offered additional inducements.

Considering the employer's position as being the negligent third person under the provisions of Section 29 of the 1913 Act, it was apparent to the employer that if he had "elected to be bound" by the Act, he could be sued only by the employer who had paid or become liable to pay compensation, and that the damages recoverable against him could not exceed the aggregate amount of compensation payable under the Act.

Is it reasonable to interpret the legislative intent of Section 29 as being solely for the benefit of the employer? Again it is pointed out that this question must be considered in the light of the circumstances and conditions as they existed at the time of the enactment of the Act and together with the statutory provisions of the other Sections of the

Act of 1913. Was it intended by the legislature that only an employer by having elected to be bound by the Act should be free from a suit by the employee of some other employer for negligence based upon personal injuries sustained by such employee?

Of course such employer could be sued as the negligent third person by the employer of the injured employee, but the damages recoverable could not exceed the aggregate amount of compensation payable. Was it intended that an employee was not to have an equal benefit under Section 29? Was it intended by the legislature that the employee who had elected to be bound by the Act should be liable as a negligent third person for damages without limit except as fixed by a jury? Was it intended by the legislature that the Act should be elective to both employers and employees within the meaning of Sections 1 (a),—(b),—(c),—(d), 2, and 3, but should be elective only to employers as regards the application of the provisions of Section 29 of the 1913 Act?

THE 1917 AMENDMENTS

It has been felt necessary to comment at some length upon certain of the provisions of the 1913 Act because as will later be pointed out, the legislative intention of Section 29 in its present form can be intelligently and logically arrived at only by careful consideration of it and certain other Sections of the 1913 Act. For many years it has been customary to think of the Workmen's Compensation Act as compulsory *and not elective* to all employers and employees engaged in any extra-hazardous business. What is sometimes overlooked is that it originally was elective to all employers and employees irrespective of the type of business.

In 1917 the first paragraph of Section 1 was amended to read as follows:

Employer — Notice.] That any employer in this State, who does not come within the classes enumerated by Section Three (3) of this Act, may elect to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this Act, and thereby relieve himself from any liability for the recovery of damages, except as herein provided.

After this 1917 amendment, the first paragraph of the

Act was identical with the first paragraph of the 1913 Act with this exception: The 1917 amendment added the words "who does not come within the classes enumerated by Section three (3) of this Act." This meant that the right of election was taken away by the 1917 amendment from every employer engaged in any of the businesses enumerated in Section 3. However, the right of election still existed for all employers whose business did not fall within the classification of businesses under Section 3.

As regards employees whose employers were engaged in businesses falling within the classification of Section 3, their right of election also was taken away.

Because of the importance of the 1917 amendment thereof, paragraphs (a) and (b) of Section 3 of the 1913 Act are again quoted below.[9]

By the 1917 amendment, Section 3 was changed as follows:

Act applies automatically to certain employments.] The provisions of this Act hereinafter following, shall apply automatically, and without election, to all employers and their employees engaged in any of the following enterprises or businesses which are hereby declared to be extra hazardous, namely. . . . [Classification of businesses omitted.]

The Compensation Act of Illinois by the 1917 amendment of Section 3, became compulsory to all employers and employees engaged in any of the enterprises listed in the Section, which list is almost identical with that of the 1913 Act and which by the 1917 amendment were "declared to be extra-hazardous" although not so described or so designated in the 1913 Act.

Section 2 of the 1913 Act was repealed by the amend-

[9] "*Defenses Abolished, Occupations Within Act.*] (a) In any action to recover damages against an employer, engaged in any of the occupations, enterprises or businesses enumerated in paragraph (b) of this section, who shall elect not to provide and pay compensation to any employee, according to the provisions of this Act, it shall not be a defense, that:

"*First*—The employee assumed the risks of the employment;

"*Second*—The injury or death was caused in whole or part by the negligence of a fellow-servant; or

"*Third*—The injury or death was proximately caused by the contributory negligence of the employee.

"(b). The provisions of paragraph (a) of this section shall only apply to an employer engaged in any of the following occupations, enterprises or businesses, namely . . . ."

ment in 1917. This Section 2 of the 1913 Act, as previously explained herein, created a conclusive presumption that every employer enumerated in paragraph (b) of Section 3 had filed notice of his election with the Industrial Board to provide and pay compensation according to the provisions of the Act until and unless such employer filed a notice to the contrary with the Industrial Board. Because by amendment of 1917 of Section 3 making the Act compulsory to all such employers, the reasons for repealing Section 2 are obvious.

THE 1917 AMENDMENT TO SECTION 29

The only change in Section 29 made by the 1917 amendment was the insertion in the first paragraph immediately after the phrase "such other person having also elected to be bound by this Act" the added phrase "or being bound thereby under Section three (3) of this Act." With the exception of the insertion of this added phrase which of course was made necessary by the amendment of Section 3, which made the Act compulsory to all employers and all employees engaged in any of the businesses therein listed and declared by the legislature to be extra-hazardous. Aside from this inserted phrase, Section 29 of the 1917 Act remained verbatim identical with Section 29 of the 1913 Act.

This above quoted phrase added by the 1917 amendment, coupled with the immediately preceding phrase, made the complete phrase "such other person having also elected to be bound by this Act, or being bound thereby under Section three (3) of this Act," and as to this completed phrase there can be no doubt as to its meaning as describing the status of the negligent third party, for the reason that after the 1917 amendments there still remained the right on the part of any employer whose business did not come within the list enumerated in Section 3 and the phrase inserted by the amendment of 1917 had direct application to those employers to whom by the 1917 amendment to Section 3, the compensation act became compulsory and automatic in its application without right of election.

What about the provisions of the second paragraph of Section 29 after the 1917 amendments to Sections 1 and 3 of the Compensation Act? There having been not the slightest

change in the wording of the second paragraph of Section 29 by the 1917 amendment, what about the meaning or significance of the phrase "such other person having elected not to be bound by this act?" Since, after the 1917 amendment to Section 3, all employers and their employees engaged in any of the businesses therein listed were deprived of their right of election "not to be bound by this act" what class of employers or employees did the legislature have in mind by the use of this phrase?

Under the terms of the act after the 1917 amendment, the only employers who might "elect not to provide and pay compensation" were those who were engaged in some business or enterprise not listed under Section 3, and who had at one time elected under Section 1 of the Act "to provide and pay compensation . . . according to the provisions of this act" and who later under the provisions of Section 1 (b) elected "not to provide and pay compensation" by filing notice of election with the Industrial Board.

The employee of such employer was deemed to have accepted the provisions of the Act and was bound thereby unless he filed a notice to the contrary with the Industrial Board. Therefore, the phrase "such person having elected not to be bound by this act" which remained in Section 29 after the 1917 compulsory amendment to Section 3, was logically applicable to both those employers and employees in those employments to which the Act was not made compulsory by the 1917 amendment to Section 3, who had accepted this Act and then later filed with the Industrial Board an election not to be bound by the Act. However, as regards any person other than an employer or an employee who had first elected to accept the Act and then filed with the Industrial Board a notice to the contrary, the phrase is apparently without any application.

The courts, with one exception,[10] have treated the phrase as merely describing a third person who was not under the act.[11]

It is a very curious fact that the exact expression or

[10] Agar Packing & Provision Co. v. Becker, 301 Ill. App. 237, 22 N.E. (2d) 447 (1939).

[11] O'Brien v. Chicago City Ry. Co., 305 Ill. 244, 137 N.E. 214 (1922); Hutton v. Pritchard, 371 Ill. 36, 20 N.E. (2d) 53 (1939) and other cases.

phrase, "such other person having elected not to be bound by this Act," still remains in the second paragraph of Section 29. After twenty-eight years, during which time the legislature repeatedly has amended the Act, this phrase remains, and it seems an even more curious fact that the courts have never called attention to its being literally and strictly applicable only in the very remote instances where, as above explained, an employer or employee to whom the Act did not apply automatically had first accepted and then later had filed an election not to be bound by the Act.

Had the court followed the clear and unmistakable language and intent of the legislature and construed the phrase as one of limitation, they might have felt constrained to find the section unconstitutional for the reason that it would have meant that a negligence suit for personal injuries could have been brought by an injured employee entitled to compensation only in those very rare cases when the defendant was an employer or employee who had first accepted and then later had rejected the Act. It might be argued that it ultimately would have been far better for everyone concerned for the court to have construed the section according to its plain language rather than to have adopted its own construction of the language. No argument is here made, but the hope is expressed this matter can be placed before the legislature for clarifying amendment, and in view of the long period of time which has elapsed and the doubt which still exists, this should not be considered unreasonable.

Let us again consider the 1917 amendment to the first paragraph of Section 29. This first paragraph is applicable to cases where all three parties — the injured employee, his employer, and the negligent third party, are under the Act.

It is another curious fact that the completed phrase containing the 1917 amendment, "such other person having also elected to be bound by this Act, or being bound thereby under Section three (3) of this Act" remains verbatim in Section 29 of the act today.

AGAR PACKING & PROVISION COMPANY v. BECKER

There is one exception, as previously mentioned, to the

court's general holding to the effect that the phrase as used in the second paragraph of Section 29, tq-wit, — "such other person having elected not to be bound by this act" means only that the alleged negligent third person was not under the Act.

This one exception is the case of *Agar Packing & Provision Company* v. *Becker*,[12] a decision of the Appellate Court for the Second District. In that case an employee of the plaintiff was killed while in the course of his employment, and the plaintiff made voluntary compensation payments to the widow. The plaintiff then sued the defendant for the wrongful death of the employee. The lower court sustained the defendant's motion to dismiss the complaint and entered judgment against the plaintiff.

Because this is the only case in which the court interpreted the language of Section 29 as meaning what the legislature said and is the only case in which the status of a farmer under Section 29 has been passed upon, the following lengthy excerpt is quoted from the court's opinion:

> The question presented to the lower court and for this court to decide, is whether under section 29 of the Workmen's Compensation Act, the Packing Company is subrogated to the rights of the personal representatives of the deceased, Peckenbaugh, against the defendant, Becker, for his wrongful death. An examination of this section of the act discloses that the first paragraph provides that where the employer, the employee and the third party who causes the injury, or wrongful death, are all under the act, there is no question but that the employer could maintain his suit. The second section of the act provides that where the employer and the employee are under the act and the third party who caused the injury might otherwise be under the act, *but has elected not to be bound by it*, there seems to be no question *but that the employer can maintain his suit.* (Italics ours.)
>
> The difficulty arises where the employer and the employee are under the act, but the third party is not of a group in any way included in the act, such as in this case where the defendant is a farmer. If the act itself is not broad enough to give the plaintiff the right to sue, the suit cannot be maintained, as such an action was not known at common law, *Crane* v. *Chicago & W.I.R.*, 233 Ill. 259, [84 N.E. 222]; *Faber* v. *Industrial Commission*, 352 Ill. 115, [185 N.E. 255]. Under the "Injuries Act" the right of action in exclusively in the personal representative of the deceased person for the benefit of the widow and next of

[12] 301 Ill. App. 237, 22 N.E. (2d) 447 (1939).

kin, and cannot be maintained by an individual. *Van Meter* v. *Goldfarb*, 317 Ill. 620 [148 N.E. 391, 41 A.L.R. 343].

Section [paragraph] 5 of Sec. 29 of the Workmen's Compensation Act provides "In the event the said employee or his personal representative shall fail to institute a proceeding against such third person at any time prior to three months before said action would be barred at law said employer may in his own name, or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representative all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act, and costs, attorney's fees and reasonable expenses as may be incurred by such employer in making such collection or in enforcing such liability."

This statute gives the employer the right to maintain his suit against "such other third party" who has caused the injury, or death of the employee. The question is, *who is meant by such other person, or third party?* If the suit can be maintained only against such third parties as are mentioned in the act, then it must be against such third party who is under the act, or one who might otherwise be under the act, but has elected not to be bound by it. It is conceded that the third party in this suit is a farmer and by [sic] section 3 of the act (Ill. Rev. Stat. 1937, Ch. 48, § 139 . . .) expressly exempts farmers from the operation of the act. (Italics ours.)

We have carefully read all the cases that have been cited by both the appellant and appellee in this case, but the question presented here, so far as we are able to ascertain, has never been presented to the Supreme or Appellate Court. In all the cases presented, the third party was either under the act, or had elected not to be bound by it.

It is our conclusion that the person committing the injury to the employee, as designated in the fifth paragraph of section 29 of the act "as such other person" means such other persons as designated in paragraphs 1 and 2 of section 29 of the act.

We think the trial court properly held that the action could not be maintained and dismissed the suit and that the judgment is hereby affirmed.[13]

Regarding the foregoing decision, it will be noted that the suit was not brought by a personal representative of the deceased employee. The fifth paragraph of Section 29, under which the action was brought and which paragraph is quoted in the court's decision, gives the employer the right to proceed in his own name where the employee or his personal

[13] 301 Ill. App. at p. 239, 22 N.E. (2d) at p. 448.

representative fails to institute proceedings against such third person. This, of course, has reference solely to a case arising under the second paragraph of Section 29, for the reason that the employee or his personal representative would not have any right of action against the third person in a case arising under the first paragraph of Section 29 where all three parties were under the act.[14]

As the court stated, the question was, "Who is meant by such other person or third party?" The court then construed this phrase—"such other person having elected not to be bound by this Act," as used in the second paragraph of Section 29, as not including a farmer. Would it not have been entirely logical and correct for the court to have based its decision upon the ground that since the farmer had not elected not to be bound by the Act, the action could not be maintained against him? Although the court's decision seems to be entirely proper, what about the correctness of the reasoning or the basis upon which the court's conclusion is predicated?

The court in its opinion states, "It is conceded that the third party in this suit is a farmer and by [sic] section 3 of the act (Ill. Rev. Stat. 1937, Ch. 48, §139 . . .) expressly exempts farmers from the operation of the act." By this statutory reference the court could have had in mind only the provision of paragraph (8) of Section 3 of the Act, which was added by amendment by the legislature in 1917, and which has remained verbatim unchanged to the present time. The compensation act as originally enacted in 1913, omitted any reference to farmers. Section 3 of the 1913 Act listed the businesses or enterprises which were conclusively presumed to be under the Act unless and until notice in writing of election to the contrary was filed with the Industrial Commission. In 1917 the legislature by amendment declared such businesses or enterprises as were enumerated under Section 3 to be extra-hazardous, and that "the provisions of this act hereinafter following" should apply automatically, without election to all employers and their employees engaged

[14] In Havana National Bank, for the use of Hartford Accident & Indemnity Co. v. Tazewell Club, 298 Ill. App. 393, it was held that an employer could not maintain a suit in the name of the personal representative of the deceased employee for compensation paid, against a third party under the Act.

in any of the enumerated enterprises or businesses. At the same time, the legislature, by amendment to paragraph (8) of Section 3, added a provision applying to farmers.

For a more complete understanding, the entire paragraph (8) of Section 3, as it now stands, is quoted herewith. Aside from the provision added by amendment in 1917, which is italicized, the paragraph stands in exactly the same language today as in the original act of 1913.

> In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use of the placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra-hazardous: *Provided, nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising, or to those who rent, demise or lease land for any such purposes, or to any one in their employ or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered.* (Italics ours.)

The foregoing provision added by the amendment of 1917, contains the only reference in the compensation act made to farmers. Can it be said that this provision, in the words of the court in the Agar case, "expressly exempts farmers from the operation of the Act"? Would it not be more logical and accurate to say that the only purpose and effect of the provision was to exempt farmers from the automatic application of the provisions of the Act? In other words, was it not the intention of the legislature merely to declare that even though statutory or municipal ordinance regulations already existing or later to be imposed, might make reference to types of machinery such as tractors, threshing machines, corn shredders, saw mills, etc., frequently used in farm operations, nevertheless that such statutory or municipal ordinance regulations should not have application to farmers so as to bring them automatically and without right of election, under the provisions of the Compensation Act? Can it be intended that the legislature by such provision of 1917 intended to exempt or deprive farmers of their right to elect, under Section 1 of the Act, to provide and pay compensation for accidental injuries to their employees according to the provisions of the Act? All employers, with the ex-

ception of those in the classes enumerated in Section 3, have such right under the provisions of Section 1. How then, can it be contended that farmers do not have such right? If it be conceded, and clearly this seems to be the only permissible interpretation, that farmers have the right under the provisions of Section 1 of the Act, as do all other employers in the state, with the exception of those enumerated in Section 3, to elect to accept the provisions of the Act, how can it be argued that the provisions of paragraph (8) of Section 3 "expressly exempts farmers from the operation of the act"? It is submitted that the sole and only purpose of the legislature in enacting such paragraph was specifically and expressly to exempt farmers from automatic application of the Act. In other words, the legislature in 1913 provided that the employers listed in Section 3 were conclusively presumed to have accepted the Act unless they filed a notice in writing to the contrary with the Industrial Commission. In 1917 the legislature withdrew the right of election from the employers enumerated in Section 3 and as to such employers made the Act compulsory but at the same time provided by a new amendment to Section 3 that such section was not to apply to farmers. Farmers were not deprived by such amendment of their right under Section 1 to elect to accept the Act. Therefore, farmers stand in the exact position of all other employers in Illinois in their relation to the Workmen's Compensation Act, with the single exception, *i.e.*, the Act is not compulsory as to them. It would seem, therefore, that the court in the Agar Packing Case arrived at a correct decision, but that upon careful analysis, the logic and accuracy of the court's reasons assigned in the court's opinion for its decision, are not supported by expressed legislative intent. However, it again is pointed out that the decision was correct not because of the assigned reason—that the defendant was a farmer—but for the unassigned reason that the defendant *had not elected not to be bound* by the Act.

The Botthof Case

Turning again to the decision in the Botthof case, which decision was followed by the court in the Lindstrom case, the court in the Botthof case, as previously pointed out, held

that the legal significance of the phrase "bound by the act" meant being subject to the terms of the Act in the sense of being liable to pay compensation to an injured employee. Upon this construction, the court stated:

> Certainly the negligent employee is not liable for compensation; therefore he is a stranger to the act, as far as his liability to his fellow employee is concerned, being a person other than the employee entitled to receive compensation or the employer liable to pay it.

Can this be said to be a correct view when the history of the Act in its original form, the fact that it originally was elective to all employers and to all employees, the subsequent amendments, the repeal of Section 2, the fact that the Act subsequently was made compulsory to certain employers and to certain employees, the fact that it is still elective to all other employers and all other employees whose employment is not within the list enumerated in Section 3, as previously discussed herein, are considered?

The court unfortunately omitted discussing the complete phrase "such other person having also elected to be bound by this Act, or being bound thereby under Section three (3) of this Act," which appears in the first paragraph of Section 29, and the complete phrase "such other person having elected not to be bound by this Act," as it appears in the second paragraph of Section 29,[15] but merely gave its interpretation of the four words, "bound by the Act" and based its decision upon such interpretation.

Since the legislative intent could be ascertained only by careful study of the history of, and amendments to, the Illinois Workmen's Compensation Act, and since the language of the acts of other jurisdictions is different, and since the legislative intent based upon both the original wording of the pertinent sections and the subsequent wording of the amendments to certain of those sections, and as is clearly and definitely expressed in the language of the legislature, the persuasiveness of decisions of courts in other jurisdictions would seem to be of little weight and of even less necessity in reaching a decision. Therefore discussion of the various

[15] "It is necessary that statutes be so construed as to give effect to each word, clause and sentence, in order that no such word, clause or sentence may be deemed superfluous or void." (Crozer v. People, 206 Ill. 464; People v. Flynn, 265 Ill. 414; Consumers Co. v. Ind. Com., 364 Ill. 145.)

citations of decisions from other jurisdictions given in the court's opinion would be neither enlightening nor helpful.

However, an excerpt from the case of *Lees* v. *Dunkerly Bros.*[16] which excerpt the court quoted in its opinion with complete approval is very interesting. Such excerpt has been quoted previously herein, but for convenience of reference is again set forth below.[17]

From the quoted portion of his opinion, it seems the Lord Chancellor envisioned a horrific condition which would ensue if one employee could not sue a fellow employee for damages for negligent acts of the latter in cases where their employer was operating under the compensation act. It would seem as logical to adopt, to at least some extent, the same reasoning in cases where the employee is injured through the negligent act of another *employer*. In such cases clearly the injured employee's right of action is *transferred* to his employer and the latter cannot recover damages from the offending employer to exceed "the aggregate amount of compensation payable under this act . . . ." and this is true no matter how free the injured employee was from contributory negligence nor how grossly negligent was the third party employer. Inasmuch as the amount of compensation payable in such cases in most instances would be far less than the amount a jury would award, might it not be as logically argued that this was a "dangerous or mischievous principle" because to the extent of the difference of the amount of compensation payable and the amount of a reasonable jury verdict, it was enabling the negligent third party employer to "escape with impunity" the full degree of his "liability

16 [1911] A. C. 5, 80 L. J. K. B. 135, 103 Law Times 467, 55 Sol. Jo. 44, 4 B. W. C. C. 115.

17 "I can hardly imagine a more dangerous or mischievous principle than that which it is sought to set up here. . . . But it is a very difficult proposition to say that a man is not to be responsible for his own negligence. *That would mean a free hand to everybody to neglect his duty towards his fellow servant, and escape with impunity from all liability for damages for the consequences of his own carelessness or neglect of duty.* Everyone must have an interest in maintaining the law in a sense hostile to such a proposition, and I should think that, of all classes in this community, workmen who work together in many dangerous employments, have the greatest interest of all in preventing the doctrine which has been put forward very carefully and reasonably from being accepted." (Italics ours.)

for damages for the consequences of his own carelessness or neglect of duty"?

The Lord Chancellor also apparently overlooked that the injured employee can recover for his injury under the provisions of the compensation act even though such injury was occasioned solely by his own negligence and that without the compensation act he could not have had a recovery against anyone. Might it not be argued that this was a "dangerous or mischievous principle" in that it put a premium upon and encouraged "his own carelessness or neglect of duty"? In fact, the import of the court's decision in the Botthof case is to place a heavier burden upon the negligent third party employee than upon the negligent third party employer. When the employer is sued under Section 29 by the employer of the injured employee (He cannot be sued by the injured employee for the reason that the latter's right of action is *transferred* to his employer.), the measure of damages is an amount not exceeding the amount of compensation payable under the Act, whereas the negligent third party employee when sued by another employee may be assessed damages by a jury in a much greater amount than is payable to the plaintiff under the terms of the Act. Can it be said that this was the intent of the legislature?

As a practical situation, the results of the decision in the Botthof case are very interesting. Few lawyers in Illinois, if any, can recall any instance prior to such decision, of a common law suit against another employee for damages for personal injuries sustained while working, especially for the same employer. Since the decision there have been a great many such suits filed throughout Illinois, and it is a very curious fact that in every instance there has been a motor vehicle involved; that is, the employees who have been sued have been operating a motor vehicle at the time of the occurrence of the injury upon which the suits are based. To understand this phenomenon, it is only necessary to refer to standard automobile liability insurance policies which contain the so-called omnibus clause, under the terms of which the insurer, generally speaking, becomes liable for damages based upon a legal liability occasioned by the use of the motor vehicle by any person with the permission of

the assured. While no statistics are available, it is common knowledge that unless there is such a policy of insurance containing the omnibus clause, there is no suit, and that in cases where there is such a policy a suit is filed.

All this, of course, is not relevant to the present discussion but is mentioned as one of the interesting developments since the Botthof decision. Whether or not such resultant developments are commendable or to be desired permits of argument both pro and con, and no opinion is here expressed.

Legislative Amendment Needed

The principal purpose of this article has been to show the imperative need of legislative amendment to Section 29 of the Workmen's Compensation Act. Our upper courts have frequently commented upon the difficulties presented by the Section, and few sections of the Illinois Workmen's Compensation Act have caused so much confusion, litigation and differences of opinion. It is unusual that although many years have passed, the section probably is still the most troublesome of all.

The cases commented upon in this article have been selected merely to emphasize the need of redrafting the entire section. There are numerous other questions which have arisen and which will arise in the future if the section remains in its present form, which have not been discussed or even mentioned in this article, and which will continue to provide ample justification to describe Section 29 as "hydra-headed."

In fact this article has been very limited in its scope, but it is hoped it will be of some assistance in indicating the need of clarifying amendments so that the need of judicial legislation will be obviated insofar as possible.